A.P.R.

HIGH COURT OF JUDICATURE CHHATTISGARH: BILASPUR (C.G.) (103)

DEATH REFERENCE NO.5 OF 2002

State of Chhattisgarh
Through: Station House Officer, Tamnar,
District: Raigarh (C.G.)

Versus

Jagdish @ Vidyut Sarkar
Son of Shivnath Sarkar,
Aged about 35 years, Resident of Bospadha,
Police Station: Ranaghati, District: Nadiya (W.B.)

and

Pawan @ Ratan Mandal
Son of Arvind,
Aged about 20 years, Resident of Village: Digari,
Police Station & District: Nadiya (W.B.)

AND

CRIMINAL APPEAL NO.1085 OF 2002

Pawan @ Ratan Mandal

Versus

State of Chhattisgarh

AND

CRIMINAL APPEAL NO.201 OF 2003

Jagdish @ Vidyut Sarkar

Versus

State of Chhattisgarh

JUDGMENT FOR CONSIDERATION

Sd/-
L.C.BHADOO
Judge

HON'BLE THE CHIEF JUSTICE

Sd/-
Chief Justice

POST FOR JUDGMENT ON 18/19 AUGUST, 2003

Sd/-
L.C.BHADOO
Judge

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HIGH COURT OF JUDICATURE CHHATTISGARH: BILASPUR (C.G.)

DIVISION BENCH: ***HON'BLE SHRI K.H.N. KURANGA, CJ***

& HON'BLE SHRI L.C. BHADOO, J.

DEATH REFERENCE NO.5 OF 2002

(Made by the Fourth Additional Sessions Judge, Fast Track Court, Raigarh under Section 366 of the Code of Criminal Procedure)

State of Chhattisgarh
Through: Station House Officer, Tamnar,
District: Raigarh (C.G.)

Versus

Jagdish @ Vidyut Sarkar
Son of Shivnath Sarkar,
Aged about 35 years, Resident of Bospadha,
Police Station: Ranaghati, District: Nadiya (W.B.)

and

Pawan @ Ratan Mandal
Son of Arvind,
Aged about 20 years, Resident of Village: Digari,
Police Station & District: Nadiya (W.B.)

Present:

Mr. Ranbir Singh, Govt. Advocate:	For the State.
Mr. Shashank Shrivastava, Advocate:	For accused Jagdish @ Vidyut Sarkar
Mr. G.S.Ahluwalia, Advocate:	For accused Pawan @ Ratan Mandal

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CRIMINAL APPEAL NO.1085 OF 2002

Pawan @ Ratan Mandal
Son of Arvind,
Aged about 20 years, Resident of Village: Digari,
Police Station & District: Nadiya (W.B.)

Versus

State of Chhattisgarh
Through: Station House Officer, Tamnar,
District: Raigarh (C.G.)

Present:

Mr. G.S. Ahluwalia, Advocate:	For the appellant.
Mr. Ranbir Singh, Govt. Advocate:	For the State/respondent.

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AND

CRIMINAL APPEAL NO.201 OF 2003

Jagdish @ Vidyut Sarkar
Son of Shivnath Sarkar,
Aged about 35 years, Resident of Bospadha,
Police Station: Ranaghati, District: Nadiya (W.B.)

Versus

State of Chhattisgarh
Through: Station House Officer, Tamnar,
District: Raigarh (C.G.)

Present:

Mr. Shashank Shrivastava, Advocate: For the appellant.

Mr. Ranbir Singh, Govt. Advocate: For the State/respondent.

J U D G M E N T

(Delivered on 8th of August, 2003)

The following judgment of the Court was delivered by *L.C. Bhadoo, J.* -

1. Accused/appellants Jagdish @ Vidyut Sarkar and Pawan @ Ratan Mandal were tried by the Fourth Additional Sessions Judge, Fast Track Court, Raigarh, in Sessions Trial No.71 of 2001, for the commission of the offence punishable under Section 302 of the I.P.C. for committing the murders of Dr. Animesh Bishwas, Smt. Mirani Bai W/o Dr. Animesh Bishwas, Miss Chandrani alias Sonu D/o Dr. Animesh Bishwas, Miss Pushpa sister of Dr. Animesh Bishwas and Master Vijay Bishwas S/o Dr. Animesh Bishwas. The learned Additional Sessions Judge by his judgment dated 27th August, 2002, after holding the accused persons guilty of the offence under Section 302 of the I.P.C. sentenced them to death.

2. Criminal Appeal No.1085 of 2002 has been filed by accused Pawan @ Ratan Mandal and Criminal Appeal No.201 of 2003 has been filed by accused Jagdish @ Vidyut Sarkar against the said conviction and sentence passed against them by the learned Fourth Additional Sessions Judge. On the other hand, the learned Additional Sessions

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Judge has made Death Reference No.5 of 2002 to this Court for confirmation of the death sentence imposed by him on the accused.

3. This judgment shall dispose of the aforesaid appeals filed by the accused persons and the reference made by the learned Additional Sessions Judge.

4. It will not be out of place here to mention that accused/appellant Jagdish @ Vidyut Sarkar is the brother of deceased Smt. Mirani Bai and accused/appellant Pawan @ Ratan Mandal was working in the clinic of Dr. Animesh Bishwas since last 15-20 days prior to the incident.

5. The prosecution case in brief is that in between 7 p.m. of 9th January, 2001 and the morning of 17th January, 2001, in Mahantpara locality of Tamnar Town, accused Jagdish & Pawan committed the murders of Dr. Animesh Bishwas, Smt. Mirani Bai & Miss Pushpa by assaulting them with stone and Miss Chandrani alias Sonu & Master Vijay Bishwas by strangulating them in the house-cum-clinic of Dr. Animesh Bishwas. On 17th January, 2001, at about 10:30 a.m. Bhuvan Mandal S/o Amardas informed Police Station: Tamnar that in the morning when he was going to village pond to take bath, he saw few ladies and gents were standing near the house of Dr. Animesh Bishwas. The house was locked from outside and foul smell was emanating from the house of Dr. Animesh Bishwas. In the presence of all, he got into the house of Dr. Animesh Bishwas from back side by climbing a ladder and saw that the dead body of Dr: Animesh Bishwas was lying and one stone slab was lying near the head of Dr. Animesh Bishwas. The bodies of the wife, daughter, sister and son of Dr. Animesh Bishwas were also lying there. He has come to know from the people that Pawan and his another relative were staying in the house of Dr. Animesh Bishwas, but they were missing since the night of 9th January, 2001, and from that day, the house of Dr. Animesh was locked. After seeing the dead bodies of the deceased persons it appeared that Pawan and his associate first caused them to

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inhale some anesthetic substance, and when the deceased persons became semi-unconscious, they murdered the elders by assaulting them with a stone and children by strangulation.

6. On the basis of this report, the Police registered a case under Sections 302 and 201 read with Section 34 of the I.P.C. The Superintendent of Police, Raigarh, handed over the investigation to PW-15 B.S. Parihar. He reached the place of incident and prepared the site plan Ex.P-36. On 17th January, 2001, he prepared the Panchanamas of the dead bodies of Dr. Animesh Bishwas, Miss Chandrani, Smt. Mirani Bai, Miss Pushpa and Master Vijay Bishwas vide Exs.P-18, P-19, P-20, P-21 & P-22, respectively and the bodies of the deceased persons were sent for post mortem examination under requisitions Exs.P-37, P-38, P-39, P-40 & P-41. A flat stone meant for grinding the spices, stained with blood was seized under Ex.P-24 and one lock Rambo Power Mark was seized under Ex.P-25. On 18th January, 2001, from the place of occurrence a suit case and a box containing currency notes, papers and silver & golden ornaments were seized under Ex.P-43 and Ex.P-44. On the same day from the place of occurrence, a blanket, empty jute bag, napkins stained with blood, shirts of the children stained with blood, a piece of sari stained with blood, plain soil, blood stained soil and one stone pestle meant for grinding the spices were seized under Ex.P-45. On the same day, in the presence of the witnesses, from the place of incident one piece of plastic bag stained with blood was seized after putting the same in a jar and certain food items which were lying on the place of occurrence, a torn plastic bag and two steel bowls with food were also seized under Ex.P-46. Visceras were also seized in a jar under Ex.P-47. On 19th January, 2001, currency notes, changes of Rs.292/-, one table clock, one citizen watch, one old chain, one box, one ladies ring, one pen nib and one silver bangle of children were also seized under Ex.P-48. On 23rd January, 2001, during interrogation, accused Jagdish gave memorandum regarding the key of the lock, Ex.P-

23, and in pursuance of that memorandum the key was recovered and seized under Ex.P-9. Accused Jagdish was arrested under Ex.P-42. One blue full sleeve shirt and one high neck cotton Baniyan were seized under Ex.P-8. Sample of nails of accused Jagdish after getting them cut were also seized under Ex.P-10. After recording the evidence of the witnesses, the Panchanama of the place where the dead bodies were lying was prepared under Ex.P-49.

7. After completion of the investigation, charge sheet was filed against the accused/appellants in the Court of Judicial Magistrate, First Class, Gharghoda, Distt. Raigarh, who committed the case to the Court of Sessions Judge, Raigarh. Thereafter, on transfer the case was received in the Court of the Fourth Additional Sessions Judge, Fast Track Court, Raigarh.

8. The learned Fourth Additional Sessions Judge after hearing the arguments of Sri T.R. Patel, Additional Public Prosecutor and Sri Rajeev Kaliya, counsel for the accused persons, framed the charges against the accused/appellants for the commission of the offence punishable under Section 302 of the I.P.C. The accused persons denied the charges and claimed to be tried.

9. The prosecution in order to prove the offence against the accused persons examined in all fifteen witnesses at the trial. The statements of the accused persons were recorded under Section 313 of the Cr.P.C. in which the accused persons simply denied the prosecution evidence and stated that they do not know anything, they are innocent and they have been falsely implicated in the crime.

10. The learned Additional Sessions Judge after hearing the arguments of the Additional Public Prosecutor and the defence counsel and after believing and placing reliance on the evidence adduced by the prosecution, convicted and sentenced the accused persons for the commission of the offence under Section 302 of the I.P.C. as aforesaid.

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11. We have heard Mr. G.S. Ahluwalia, counsel for accused/appellant Pawan @ Ratan Mandal; Mr. Shashank Shrivastava, counsel for accused/appellant Jagdish @ Vidyut Sarkar and Mr. Ranbir Singh, Govt. Advocate for the State.

12. As far as the nature of death of Dr. Animesh Bishwas, Smt. Mirani Bai, Miss Chandrani alias Sonu, Miss Pushpa and Master Vijay Bishwas being homicidal is concerned, learned counsel appearing for the accused/appellants have not disputed this fact. PW-5 Dr. Budhiyar Singh has stated in his evidence that on 18th January, 2001, he was posted as Assistant Surgeon in the Primary Health Centre, Tamnar and on that day on the requisition of Police Station: Tamnar, he conducted the post mortem examination on the dead body of Dr. Animesh Bishwas. On examination, he found that the smell was emanating from the body of the deceased; rigor mortis was present on the body; there was fracture of maxillary and lower mandible; there were maggots over the face & mouth; there was no skin over the neck & upper chest; muscles and vertebra; fractured clavicle and ribs were found over the chest with full of maggots; there was peeling of skin all over the body and there was full of maggots. The injuries were ante mortem in nature and caused by hard and blunt object. The cause of the death was shock due to injuries over the face, neck and upper chest leading to cardio respiratory failure and death. The nature of death seemed to be homicidal. The post mortem report is Ex.P-12. The doctor has further stated that on the same day he conducted the post mortem examination on the body of Miss Chandrani. One rope around the neck was present, there was mark of the rope around the neck and knot mark was also seen. The rope mark was between the chin and the thyroid cartilage. The right hand was separated from the shoulder and the whole body was putrefied. The injuries were ante mortem in nature and caused by hard and blunt object. The death was within 8-10 days from the date of post mortem examination. The cause of the death of

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the deceased was asphyxia due to strangulation leading to cardio respiratory failure and death. The death was homicidal in nature. The post mortem report is Ex.P-13. He has further stated that on the same day he has conducted the post mortem examination on the dead body of Smt. Mirani Bai. The mandible was found fractured; the skin on the chest and neck was missing; the bone of the left shoulder was fractured; the ring finger of the left hand was broken; the face was disfigured; the whole face was full of maggots; and there was fracture of clavicle bone. The injuries were ante mortem in nature and caused by hard and blunt object. In his opinion, the cause of the death was shock due to injuries over the face, neck and upper chest leading to cardio respiratory failure and the nature of death was homicidal. The post mortem report is Ex.P-14. He has further stated that on the same day, he conducted the post mortem examination on the dead body of Master Vijay, a six months old male child. The smell was emanating from his body, rope knot was present on the left side of the neck just below the left mastoid process and the rope mark was between the chin and thyroid cartilage. In his opinion, the cause of death was asphyxia due to strangulation leading to cartilage respiratory failure and death. The death was homicidal in nature. The post mortem report is Ex.P-15. He has further stated that on the same day he conducted the post mortem examination on the dead body of Miss Pushpa, aged about 19 years. On post mortem examination he found that there was fracture of the mandible with full of maggots all over the face; there was fracture of the left clavicle bone; there was peeling of the skin over the hands, abdomen, thigh and both lower limbs. The injuries were ante mortem in nature and caused by hard and blunt object. In his opinion the mode of the death was shock due to injuries over the face, neck and upper chest leading to cardio respiratory failure. The death was homicidal in nature. The post mortem report is Ex.P-16.

13. The defence has not been able to elicit anything in the cross-examination of the doctor, which makes the evidence of this witness (PW-5) doubtful or unreliable. In view of the above evidence of Dr. Budhiyar Singh it stands proved that the nature of the deaths of Dr. Animesh Bishwas, Smt. Mirani Bai, Miss Pushpa, Miss Chandrani and Master Vijay were homicidal.

14. As far as the question of involvement of the accused persons in committing the five murders of Dr. Animesh Bishwas, Smt. Mirani Bai, Miss Pushpa, Miss Chandrani and Master Vijay is concerned, there is no eyewitness to the crime and whole case rests on the circumstantial evidence. The law on the point is that in a case based on circumstantial evidence the Court can record conviction but it must satisfy itself that the circumstances from which an inference of guilt could be drawn have been established by unimpeachable evidence led by the prosecution and that all the circumstances put together are not only of a conclusive nature but also complete the chain so fully as to unerringly point only to the guilt of the accused and are not capable of any explanation which is not consistent with the hypothesis of the guilt of the accused.

15. The prosecution has tried to prove the following circumstances against the accused/appellants in order to connect them with the murders of the above five persons: -

i. The key of the lock of the house of Dr. Animesh Bishwas was seized at the instance of accused Jagdish @ Vidyut Sarkar.

ii. Accused Jagdish @ Vidyut Sarkar and Pawan @ Ratan Mandal were staying in the house of the deceased persons for the last 10-15 days of the date of the death of the deceased persons.

iii. Accused Jagdish @ Vidyut Sarkar purchased chloroform from the shop of Babulal Gupta (PW-3).

16. It is undisputed that accused Jagdish @ Vidyut Sarkar is the brother-in-law (wife's brother) of deceased Dr. Animesh Bishwas and accused

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Pawan @ Ratan Mandal was working in the clinic of Dr. Animesh Bishwas for the last 10-15 days prior to the date of the incident. It has also not been disputed that these two accused persons were residing with the deceased family for last more than ten to fifteen days prior to the date of offence in their house.

17. As far as point (i.) is concerned, PW-15 B.S. Parihar has stated in his evidence that on 23.01.2001 in presence of PW-2 Sheetaldas Mahant & PW-10 Manikdas, accused Jagdish gave the memorandum Ex.P-23 and in pursuance of that memorandum a key was seized at the instance of the accused under Ex.P-9. PW-2 Sheetaldas has stated in his evidence that no recoveries were made in his presence and Ex.P-9 & Ex.P-10 bear his signatures. In the examination in chief, he has not stated that accused Jagdish gave any information Ex.P-23 in his presence and as regards Ex.P-9 he has stated that no recoveries were made in his presence. In the re-examination this witness has stated that after 6-7 days of the date of coming to know about the death of Dr. Animesh Bishwas, the Police enquired from accused Jagdish and then he said that he had thrown the key on the bank of the pond. Thereafter, they took the accused to the pond and the key was recovered. But in the cross examination this witness has stated that the key (Article 'A') is not the same which was seized at the instance of the accused. The key, which was seized at the instance of the accused, was of steel colour. He stated that Ex.P-23 bears his signature. He could not say whether the key was the same or not. He has further stated that the Police people told him that the accused has disclosed to them as to where the key was lying and the Police people further said, "let us go there and recover the key". Memorandum Ex.P-23 was not written in his presence, even the recovery memo of the key was also not written in his presence. The lock, which was opened from the house of the deceased, was bigger than the lock, which was shown to him in the Court. He signed the papers in the Police Station without reading them. Even the Police had

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not read over those papers to him. PW-10 Manikdas in the examination in chief itself has stated that the lock (Article 'B') was not the same lock which was opened by the Police from the house of Dr. Animesh Bishwas and the key Article 'A' which was shown to him in the Court was not the same key which was found and seized from the bank of the pond. The Police had not prepared any recovery memo in his presence. Memorandum Ex.P-23 bears his signature. It is incorrect to say that on 23rd January, 2001, accused Jagdish gave the memorandum Ex.P-23 in his presence. The lock was broke opened in his presence by the Police and the lock became flat from the middle. The lock, which was broke opened from the house of Dr. Animesh Bishwas was much bigger than the lock (Article 'B') shown to him in the Court. It is incorrect to say that the articles were seized vide Ex.P-8 and Ex.P-9 in his presence.

18. In view of the above evidence of the two witnesses namely, PW-2 Sheetaldas & PW-10 Manikdas, it is clear that they have not supported the recovery of the key of the lock of the house of deceased Dr. Animesh Bishwas at the instance of accused Jagdish and even they have gone to the extent of saying that the lock (Article 'B') which was produced in the Court was not the same lock which was broke opened from the house of the deceased. In view of this evidence, the recovery of key at the instance of the accused is doubtful and it is not proved. Moreover, the key was recovered from an open place i.e. from the bank of a pond and there is no evidence that the key (Article 'A') was tried with the lock, which was found on the house of the deceased, and in fact this Article 'A' was the key of the lock (Article 'B'). Even otherwise, there is no other evidence on record on the basis of which it can be said that the key (Article 'A') is the same key of the lock of the house of deceased Dr. Animesh Bishwas. Thus, the recovery of the key itself is doubtful. Moreover, the prosecution has not been able to establish that the key (Article 'A') is the same key of the lock of the house of Dr. Animesh Bishwas.

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19. PW-1 Bhuvanlal in his evidence has stated that he entered the house of Dr. Animesh Bishwas from backside of the house by climbing a ladder and thereafter, saw the dead bodies in the house, whereas PW-12 Lalaram Rathiya has clearly stated in his evidence that the back door of the house of Dr. Animesh Bishwas was found half opened and the dead bodies lying in the house were visible. Therefore, the case of the prosecution that the accused persons after murdering the deceased persons came out from the house and locked it from front side, becomes doubtful, because according to the evidence of PW-12 Lalaram Rathiya, the back door was already found half opened through which any person could have entered into the house. Therefore, the recovery of the key at the instance of accused Jagdish on this ground also is of no help to the prosecution. Thus, the prosecution has utterly failed in connecting accused/appellant Jagdish with the crime on the basis of recovery of the key.

20. Now, we come to the second circumstance, point (ii), that accused Jagdish & Pawan were present in the house of deceased Dr. Animesh Bishwas for the last 10-15 days prior to the death of the deceased. In order to connect the accused with the murder of the deceased persons based on the circumstance that the accused persons were last seen with the deceased persons when they were alive, the law laid down by the Hon'ble Apex Court on this point is that in order to establish the crime of murder against the accused persons based on the circumstance of last seen, the prosecution has to prove that the time gap between the last seen and murder must be so proximate and so close that there should not be any possibility of drawing any inference of innocence of the accused persons and there should not be any possibility of meeting of any one else with the deceased in between. In other words, there should be no other possibility than that the accused persons and they alone have committed the heinous crime. The last seen circumstance is a very weak type of evidence. It should be corroborated by some other

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independent material evidence. The Apex Court in the case of **Bodhraj alias Bodha and others vs. State of Jammu and Kashmir** reported in (2002) 8 SCC 45 has held that the last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. The Apex Court further held that it would hazardous to come to a conclusion of guilt in cases where there is no other positive evidence to conclude that the accused and the deceased were last seen together. Similarly, the Apex Court in the case of **Subhash Chand vs. State of Rajasthan** reported in **(2002) 1 SCC 702** has specifically held that last seen together must be near about the date and time of the incident. Merely on the basis of last seen accused persons cannot be held guilty.

21. Based on these principles now we shall proceed to examine the evidence in the present case. PW-1 Bhuvanlal who is the author of Ex.P-7, the report given at the Police Station, has given a wavering statement. He has stated in his evidence that he does not know at what time and who were coming to the residence of deceased Dr. Animesh Bishwas. This witness was declared hostile. On being cross-examined by the prosecutor, again in para-4, he has stated that he does not know who used to come to the residence of the deceased persons. He also does not know when the guest staying at the house of the deceased had left. He has further stated that along with the accused persons some other guests were also staying at the house of the deceased. Only when the Police arrested the accused persons he came to know that those persons have committed the murders. He does not know whether any other person has murdered Dr. Animesh Bishwas. In cross examination by the Additional Public Prosecutor, in para-2 of his evidence he has stated that it is true that accused Pawan and his associate were staying at the residence of Dr. Animesh Bishwas for the last 8-10 days prior to

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the date of incident. He also disclosed to the Police that these two persons were not seen from the day from which the house of deceased Dr. Animesh Bishwas was found locked. PW-2 Sheetaldas has stated in para-2 of his evidence that accused persons were staying in the house of deceased Dr. Animesh Bishwas for the last 10-15 days. The house of Dr. Animesh Bishwas was locked, therefore he thought that Dr. Animesh Bishwas must have gone to the village for arranging the marriage of his sister. In para-3 he has stated that in the night only, Dr. Animesh's family was murdered, when the accused persons were present in the house. In para-5 of his cross-examination, he has stated that along with the accused persons, Amit Bishwas, the brother of Dr. Animesh Bishwas, was also staying. He has further stated that he does not know whether the accused persons or any one of them had gone to their/his native place. Thereafter, he stated that the accused persons stayed at the residence of Dr. Animesh Bishwas till the day of the incident. He stated that it is true that 3-4 days after the recovery of the dead bodies and arrest of the accused persons he came to know that the accused persons had committed the crime. In para-7 he has further stated that it is true that on 09.01.2001, the brother of Dr. Animesh Bishwas namely, Anoop Bishwas came and stayed in the house of Dr. Animesh Bishwas. He further stated that on 09.01.2001 whether any other guest came and stayed at the house of Dr. Animesh Bishwas, he does not know. He informed the Police that in the night of the incident the accused persons were staying at the residence of Dr. Animesh Bishwas. If this fact has not been recorded in his Police statement Ex.D-1 he cannot give any reason. It is true that he had not seen accused Pawan staying at the house of the deceased.

22. PW-4 Vinodrai has stated that one month earlier to the date of the incident he went to the house of Dr. Animesh Bishwas to see the girl for marriage negotiations and at that time accused Jagdish was present in the house. Thereafter, he also recognized accused Jagdish in the

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identification parade. On the day when he went to see the girl, Amit Bishwas & Anuj Mallik were also present in the house of Dr. Animesh Bishwas. PW-7 Punidas has stated in his evidence that the accused persons came to the residence of deceased Dr. Animesh Bishwas 10-12 days prior to the date of the incident and they stayed in his residence for 10-12 days. He has further stated that he saw the accused persons at the residence of Dr. Animesh Bishwas and they said that they had come in search of a job in Jindal Factory. In the cross examination, he has stated that it is true that guests used to come to the house of Dr. Animesh Bishwas, but on the day of the incident no persons other than the accused were staying. He does not know Anuj Mallik and Amit Bishwas, because he was sick on those days, therefore, at about 8 O' clock in the night he used to go for sleep and thereafter, he did not come out of the house. He does not know whether the accused persons or any of them had gone to their native place. Thereafter, he stated that in the evening of the fateful day he saw the accused persons at the residence of Dr. Animesh Bishwas. He stated that it is incorrect to say that 4-5 days prior to the date of incident the accused persons had gone to their native place.

23. PW-10 Manikdas has stated in his evidence that he saw the accused persons in the house of Dr. Animesh Bishwas and they were staying there for the last 10-12 days prior to the date of the incident. He has stated that one-day prior to the day from which Dr. Animesh's house was locked he saw accused Pawan boarding the dumper. After he saw accused Pawan boarding the dumper, the house of Dr. Animesh Biswas remained closed for 8-10 days. In para-7 of the cross examination, this witness has stated that it is true that accused Pawan left after boarding the dumper and thereafter, he came to the residence and saw that deceased Dr. Animesh Bishwas was sitting with accused Jagdish. His house is in the neighbourhood of Dr. Bishwas.

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24. In view of the above evidence of the prosecution, it is established that accused Jagdish @ Vidyut Sarkar who is the brother of deceased Mirani Bai and brother-in-law of Dr. Animesh Bishwas was staying at the house of Dr. Animesh for the last 10-12 days prior to the date of incident. Accused Pawan @ Ratan Mandal was also staying there. He came there and was working in the clinic of Dr. Animesh Bishwas. But the prosecution has not been able to prove that on the fateful night when the deceased were murdered the accused persons were in the house and there was no possibility of any one else coming to the house of the deceased. PW-10 Manikdas has specifically stated that as far as accused Pawan is concerned he had left the village on the same day evening by a dumper and accused Pawan told him that he was going to his village. When PW-10 Manikdas came back to his house, he saw accused Jagdish and deceased Dr. Animesh together.

25. The other circumstance which makes the prosecution case doubtful is that it has come in the evidence of PW-2 Sheetaldas that the brother of Dr. Animesh Bishwas namely, Amit Bishwas and another brother Anoop Bishwas were also present on that day in the house. PW-4 Vinodrai has also stated that one month earlier to the date of the incident when he went to see the girl for marriage purpose, he saw Amit Bishwas present in the house of Dr. Animesh Bishwas and one Anuj Mallik was also present there. From the evidence of these two witnesses it is proved that Amit Bishwas who is the brother of Dr. Animesh Bishwas was regularly staying there. Moreover, there is no evidence that during the night of the incident, the accused persons were the only persons who were staying in the house of the deceased persons. The accused persons were brought from their native place, Calcutta (W.B.). Since accused Jagdish @ Vidyut Sarkar being a relative of Dr. Animesh Bishwas i.e. the brother-in-law (brother of his wife), he was staying in his house. Similarly, accused Pawan @ Ratan Mandal was also staying in the house as he was working for the last 10-

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15 days with Dr. Animesh Bishwas. Hence, their presence in the house was not unnatural. In view of the relation-ship they were supposed to stay in the house. Looking to the facts and circumstances of the present case, the prosecution was required to prove beyond reasonable doubt that there was no other possibility that any one else except the accused persons came to the house of the deceased persons.

26. Apart from the above, PW-12 Lalaram Rathiya, the then Police Head Constable, has stated that the back door of the house of the deceased was found open. Therefore, the prosecution case that the accused persons after committing the ghastly crime, left the house of the deceased after locking it from front side and the evidence of PW-1 Bhuvanial who has stated that the house was locked and therefore, he got into the house from back side after climbing by a ladder, becomes unreliable.

27. Apart from this, in a case based on circumstantial evidence, in order to connect the accused with the heinous crime, motive always plays a vital role in connecting the accused with the crime. But, in this case, motive is totally missing. The prosecution has not been able to lead any evidence to show what was the motive for the accused persons to commit such a ghastly and heinous crime. There is no reason why, accused Jagdish @ Vidyut Sarkar who is the brother of deceased Mirani Bai, without any motive, should commit the murder of his own sister and the small children of his own sister. Had the prosecution adduced at least some evidence regarding the motive behind this gruesome and heinous crime that could have been very helpful to draw an inference that the accused persons are the authors of this crime.

28. All the jewellery, ornaments and other valuable articles including cash were found intact in the house and nothing has been recovered from the accused persons, which connects them with the crime. This circumstance, and more particularly the absence of any other

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circumstance and material evidence to connect these persons with the murder of Dr. Aminesh Bishwas and his family, we are unable to hold the accused/appellants guilty of the crime.

29. As has been mentioned above, last seen evidence is a very weak type of evidence. Unless some other circumstantial evidence or material evidence to connect the accused persons with the heinous crime is brought on record, merely on the basis of last seen together, it is very difficult to hold the accused/appellants guilty of such a ghastly crime. In order to connect the accused persons based on the last seen evidence the time gap between the death of the deceased and the time when they were seen alive with the accused persons must be so small and so proximate that the only inference which can be drawn must be that the accused persons are the persons who committed the heinous crime and they are the only persons who are the authors of the crime. Therefore, in view of the above evidence, the prosecution has not been able to establish by adducing unimpeachable evidence that this circumstance is of such a conclusive nature that it completes the chain so fully as to unerringly point only to the guilt of the accused and are not capable of any explanation which is not consistent with the hypothesis of the guilt of the accused persons.

30. The learned Govt. Advocate appearing on behalf of the State submitted that it is not necessary for the prosecution to prove motive behind the crime. Even if the motive is not proved, based on the other evidence charge can be proved against the accused. In support of his submission, the learned Govt. Advocate relied upon the following judgments: -

(1) Gurcharan Singh and another vs. State of Punjab reported in AIR 1956 SC 460. In this case, the Hon'ble Apex Court held that where the positive evidence against the accused is clear, cogent and reliable, the question of motive is of no importance. Therefore, the principle laid down in this judgment by the Apex Court is that if other cogent, clear and reliable evidence is available and motive is absent, then based on that evidence, the accused can be convicted.

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(2) Subedar Tewari vs. State of U.P. and others reported in AIR 1989 SC 733. In this case, the Hon'ble Apex Court has held that the evidence regarding existence of motive which operates in the mind of an assassin is very often than not within the reach of others. The motive may not even be known to the victim of the crime. The motive may be known to the assassin and no one else may know what gave birth to the evil thought in the mind of the assassin. A crime can take place even without pre-meditation or preplanning in the context of a particular situation on the spur of the moment. This was a bride burning case in which the Hon'ble Apex Court relied upon the other evidence available, circumstantial evidence looking to the discord between the husband and the wife and the conduct of the accused. Relying upon the medical and circumstantial evidence, the Court reached to the conclusion that the offence is proved.

(3) Paras Ram vs. The State of Himachal Pradesh reported in 1973 Cri.L.J. 428. In this case, the Court held that motive is not an ingredient of an offence. The proof of motive helps the Court in coming to a correct conclusion when there is no direct evidence. Where there is direct evidence implicating an accused in an offence the absence of proof of motive is not material. Therefore, the Court held that if direct evidence is available and motive is absent even then the accused can be convicted.

(4) State of Haryana vs. Sher Singh and others reported in AIR 1981 SC 1021. In this case, the Hon'ble Apex Court observed that the prosecution is not bound to prove motive of any offence in a criminal case, inasmuch as motive is known only to the perpetrator of the crime and may not be known to others. If the motive is proved by the prosecution, the Court has to consider it and see whether it is adequate.

(5) Nachhittar Singh vs. The State of Punjab reported in AIR 1975 SC 118. Motive - Absence of - Effect - The failure of the prosecution to establish the motive for the crime committed by the accused does not mean that the entire prosecution case has to be thrown over-board. It only casts a duty on the Court to scrutinize the other evidence, particularly of the eyewitnesses, with greater care.

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31. But, on the other hand, Hon'ble the Apex Court in the case of **Suresh Chandra Bahri vs. State of Bihar** reported in **AIR 1994 SC 2420** has held that sometimes motive plays an important role and becomes a compelling force to commit a crime and therefore motive behind the crime is a relevant factor for which evidence may be adduced. A motive is something which prompts a person to form an opinion or intention to do certain illegal act or even a legal act but with illegal means with a view to achieve that intention. In a case where there is clear proof of motive for the commission of the crime it affords added support to the finding of the Court that the accused was guilty for the offence charge with. But the absence of proof of motive does not render the evidence bearing on the guilt of the accused nonetheless untrustworthy or unreliable because most often it is only the perpetrator of the crime alone who knows as to what circumstances prompted him to a certain course of action leading to the commission of the crime.

32. The principles enunciated in the above case laws by the Hon'ble Apex Court are that it is very difficult for the third person to know the motive of the criminal, because the motive always remains in the mind of the criminal only. Further, when other direct or strong circumstantial strong evidence is available, even if the prosecution is not able to prove the motive, conviction can be based on that evidence. Apart from that, it has been held by the Apex Court that even though it is not necessary for the prosecution to prove the motive, but when the prosecution case fully rests on the circumstantial evidence and if the prosecution is able to prove the motive behind the crime then the motive plays a vital role for resting the conviction based on the other evidence. As has been discussed in the earlier part of the judgment, the prosecution has not been able to connect the accused persons, by any circumstance, with the heinous murders of five persons. The only strong circumstance upon which the prosecution has relied upon is that the accused persons were staying in the house of the deceased.

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Therefore the prosecution tried to connect the accused persons based on the circumstance of the accused persons last seen with the deceased persons. Even the prosecution has not been able to connect the accused persons with the murders based on this circumstance. It is not safe to hold the accused/appellants guilty of the offences on the basis of this circumstance alone. Coupled with this, if the prosecution was able to bring on record some evidence to show the motive to commit the murder of his own sister, brother-in-law and their children by accused Jagdish @ Vidyut Sarkar and own master by accused Pawan @ Ratan Mandal, then the situation would have been different.

33. Now coming to the third circumstance that accused Jagdish @ Vidyut Sarkar purchased chloroform from the shop of Babulal Gupta (PW-3), first of all there is no evidence on record by which it can be inferred that the deceased were caused to inhale any anesthetic substance to ensure that they become semi-conscious. Even in the post mortem reports, there is nothing to show that any symptom of inhaling of chloroform by the deceased persons was found. Therefore, this circumstance that accused Jagdish purchased chloroform from PW-3 Babulal is of no help to the prosecution. Even otherwise, PW-3 Babulal in the examination in chief has stated that 4-5 days prior to the date of incident accused Jagdish came and purchased chloroform. Therefore, first of all the time gap between the purchase of chloroform and deaths was quite longer. Even otherwise, in para-2 of the cross examination, he has stated that accused Jagdish came only once to his shop to purchase chloroform. He stated that the accused was identified in the Police Station in the presence of Police people and Police people told him that he was Jagdish. Therefore, according to PW-3, Jagdish came only once to his shop and thereafter, the Police personnel introduced the accused to this witness that he was Jagdish. In view of this, the evidence of this witness is not reliable and does not inspire confidence. Therefore, this circumstance has also not been

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proved and based on this circumstance, the accused cannot be connected with the murder of the deceased persons.

34. In view of the above, the prosecution has utterly failed to bring home the guilt against the accused/appellants by any reliable, legal and unimpeachable evidence. Therefore, the finding of the learned trial Court holding the accused/appellants guilty of the five murders cannot be sustained as the same is not based on legal, convincing, reliable and unimpeachable evidence. The evidence adduced by the prosecution in order to prove the offence against the accused/appellants based on the circumstantial evidence has not stood up to the expected level of test laid down by the Hon'ble Apex Court in the matter of placing reliance on the circumstantial evidence. The learned trial Court has not appreciated the evidence of the prosecution properly. Therefore, the judgment of conviction of the accused/appellants for the commission of the offence under Section 302 of the I.P.C. cannot be sustained and the same is liable to be set aside.

35. It is unfortunate that for five brutal, ghastly and gruesome murders of this magnitude no one is being held responsible. The accused can be convicted only on legal evidence. When the case is based on circumstantial evidence, the chain of circumstances have to be so complete as to rule out the possibility of any other reasonable hypothesis excepting the guilt of the accused. As has been held by the Hon'ble Apex Court between 'may be true' and 'must be true' there is long distance to travel, which must be covered by clear, cogent and unimpeachable evidence by the prosecution before an accused is condemned as a convict. As discussed in the earlier part of the judgment, there is no evidence to connect the accused/appellants with the murders of the deceased persons.

36. In the result, the appeals of the accused/appellants Jagdish @ Vidyut Sarkar and Pawan @ Ratan Mandal succeed and the same are allowed.

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The impugned judgment of the learned trial Court convicting and sentencing the accused/appellants for the commission of the offence under Section 302 of the I.P.C. is set aside. The accused/appellants are acquitted of the charge. They be set at liberty forthwith if not required in any other case.

37. Consequently, the reference made by the learned Additional Sessions Judge for confirmation of the death penalty cannot be accepted. Therefore, the same is rejected.

Sd/-
Chief Justice

Sd/-
L.C.BHADOO
Judge
18/08/03

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